FIGURE 8
MAP SHOWING PROPOSED CONTOURS
RADIO STATION WEEP
PITTSBURGH, PENNSYLVANIA
1000 KC 5
50 KW D&N
25 KW-CH
WEEP
590
25 mv/m = 25 KW-DA
5 mv/m = 25 KW-DA
2.5 mv/m = 25 KW-DA
25 mv/m = 50 KW-DA
5 mv/m = 50 KW-DA
2.5 mv/m = 50 KW-DA
PA
OHIO
VA
W VA

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973.

## No. 73-791.

GOLDEN TRIANGLE BROADCASTING, INC.,
*Petitioner,*

*v.*

JOSEPH M. FIELD,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND APPENDICES.

HERBERT G. KEENE, JR.,
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## INDEX.


| | Page |
|---|---|
| QUESTION PRESENTED | 1 |
| COUNTERSTATEMENT OF THE CASE | 2 |
| ARGUMENT | 5 |
| I. The Pennsylvania Supreme Court Properly Exercised Its Equitable Powers in Granting Specific Performance and Modifying the Decree to Accommodate Intervening Circumstances | 5 |
| II. There Is No Conflict Between the State Court's Specific Performance Decree and the Federal Communications Act | 10 |
| CONCLUSION | 12 |
| APPENDIX A | A1 |
| APPENDIX B | A5 |
| APPENDIX C | A7 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Coppom v. Humphreys, 171 Colo. 410, 467 P. 2d 816 (1970) | 8 |
| Fitzpatrick v. Allied Contracting Company, 24 Ill. 2d 448, 182 N. E. 2d 183 (1962) | 8 |
| Fontaine v. Brown County Motors Co., 251 Wis. 433, 29 N. W. 2d 744 (1947) | 9 |
| King v. Raab, 123 Iowa 632, 99 N. W. 306 (1904) | 5, 6 |
| Nelson v. Robinson, 189 Iowa 1076, 178 N. W. 416 (1920) | 8, 9 |
| Phillips v. Coast, 130 Pa. 572 (1890) | 9 |
| Regents of Georgia v. Carroll, 338 U. S. 586, 70 S. Ct. 370, 94 L. ed. 363 (1950) | 10, 11 |
| Schiavone v. Ashton, 269 Ill. App. 386 (1933) | 9 |


## AUTHORITY CITED.


| | Page |
|---|---|
| Annot., 7 A. L. R. 2d 1205 § 18 | 9 |

## QUESTION PRESENTED.

Whether the Supreme Court of Pennsylvania has acted properly in modifying a Decree of Specific Performance of an Agreement to sell radio stations to add as a condition to that Decree the requirement that the plaintiff pay for the cost of and defendant transfer a transmitter facility constructed during the pendency of the litigation, where the construction permit and land option for such facility as well as the transmitter itself were to be transferred under the original Agreement and where the Court remands the matter for a hearing on construction costs.

## COUNTERSTATEMENT OF THE CASE.

In this equity action, Joseph M. Field ("Respondent") sought and obtained specific performance of an Agreement (Appendix A hereto) with Golden Triangle Broadcasting, Inc. ("Petitioner") for the sale of the assets of two radio stations, WEEP-AM and WEEP-FM, Pittsburgh, Pennsylvania, subject to Federal Communications Commission ("FCC") approval. Only the Decree with respect to the AM station is at issue here.

At the time the Agreement was made on August 14, 1968, the AM station was licensed to operate with 1,000 watts (1 kw) of power, but Petitioner had received from the FCC a construction permit to increase the power to 50,000 (50 kw). It also owned a 50 kw transmitter and an option to acquire a transmitter site for construction of a 50 kw facility. The Agreement required Petitioner at closing to deliver the AM and FM stations as then licensed and to use its best efforts to deliver the 50 kw construction permit to Respondent, together with the 50 kw transmitter and the site option.

Petitioner attempted to repudiate the Agreement on October 31, 1968, and this action was commenced on November 6, 1968. Trial was held in January, 1970, at which time Petitioner made no attempt to show it had used its best efforts to retain the construction permit. Rather, it offered testimony showing that it was in the process of and had made substantial expenditures in constructing the 50 kw facility (constructing a transmitter building, broadcast towers, exercising the site option) and argued that such construction expenditures made specific performance at the contract price inequitable. Respondent contended that Petitioner could have applied for and obtained an extension of the construction permit, that it was not obliged to

have made such expenditures, and that its own acts during pendency of the litigation could neither impose an additional financial obligation on Respondent nor defeat specific performance. At that time, construction was not yet complete, the 50 kw facility was not yet licensed by the FCC and, therefore, specific performance of the sale of the station as a 1 kw facility was still possible. The lower court granted specific performance of the sale of the station as a 1 kw facility.

Prior to its appeal to the Supreme Court of Pennsylvania, Petitioner had sought and obtained from the FCC a modification of its AM license from 1 kw to 50 kw. In its brief on appeal, Petitioner again raised the issue of the 50 kw facility as a basis for defeating specific performance, then claiming that the modification of the license to 50 kw subsequent to trial made specific performance as a 1 kw facility, as decreed by the lower court, an impossibility. (See Appendix B hereto, Petitioner's Appeal brief pp. 64-65).

Argument before the Supreme Court was held on September 28, 1972. Petitioner again strenuously contended that the modification of the license to 50 kw subsequent to trial made specific performance as a 1 kw facility impossible and that it had been obligated so to construct. Respondent answered that if the license modification made specific performance of the sale of the station as a 1 kw facility impossible, the Supreme Court should modify the Decree to provide for specific performance of the sale of the station as a 50 kw facility, and that if the Court concluded that Petitioner had not acted willfully, it could condition its Decree on reimbursement to Petitioner of its costs of constructing the 50 kw facility. Respondent analogized this situation to cases where during litigation to compel specific performance of realty agreements, improve-

ments such as sewers were made and assessments levied pursuant to legally mandated authority, and where appellate courts have conditioned specific performance decrees on payment for the assessments for such improvements. (Respondent's post-argument letter citation of such authorities to the Pennsylvania Supreme Court is attached hereto as Appendix C.)

The Supreme Court of Pennsylvania modified the lower court's decree of specific performance to require conveyance of the station as a 50 kw facility upon reimbursement to Petitioner of its costs of constructing the 50 kw facility, and remanded for a hearing on such costs (Petition for Certiorari, Appendix A, pp. 17a-18a).

## ARGUMENT.

The basic issue in the instant case was whether, under Pennsylvania law, Petitioner had entered into an agreement to sell its two radio stations. The Pennsylvania Courts found that Petitioner had so agreed, that it had breached its agreement, and was required specifically to perform it. In its appeal from the lower court's grant of a specific performance decree, Petitioner raised the fact that events had occurred during the pendency of the litigation from which it contended that specific performance was impossible. The Supreme Court of Pennsylvania took cognizance of the facts Petitioner raised, and modified the lower court's Decree to do equity to Petitioner while providing equity to Respondent. Far from being injured by the Pennsylvania Supreme Court's action, Petitioner benefited by being granted reimbursement for costs it had expended on the AM station during the litigation. In any event, none of these questions involve federal matters worthy of consideration by this Court.

### I. The Pennsylvania Supreme Court Properly Exercised Its Equitable Powers in Granting Specific Performance and Modifying the Decree to Accommodate Intervening Circumstances.

It is beyond question that state courts of equity have the power to decree specific performance of agreements. It is equally clear that state courts, lower and appellate, have the power to modify such decrees to take cognizance of changed circumstances and thereby do equity to both parties. See, e.g., *King v. Raab*, 123 Iowa 632, 99 N. W. 306 (1904), where the court stated that equity has often recognized "the right to impose conditions where there has been a change of circumstances for which neither party

can be blamed." (99 N. W. at p. 307). When the Pennsylvania Supreme Court modified the Decree to require transfer of the 50 kw facility, it was simply applying the Agreement to changed circumstances.

The crucial fact is that the Agreement specifically covered the (then prospective) 50 kw facility, and provided for its transfer, in embryo form, to Respondent. When the Agreement was executed, Petitioner owned a construction permit (allowing construction of a 50 kw facility), an option on a site for the building and towers, and a transmitter. The Agreement expressly required Petitioner to transfer the construction permit and option to Respondent and to sell him the transmitter (Agreement, Appendix A hereto, paragraphs 5-7). Petitioner was also required to use its best efforts to keep the construction permit in effect until closing, but if it could not, the sale was still to be made with a price reduction. (*Id.*)

Petitioner has attempted to imply that the 50 kw facility was something not in the contemplation of the parties, but that is not the case. Had Petitioner not breached its Agreement with Respondent, Respondent would have received the construction permit, site option and transmitter at closing, and Respondent would have constructed (or decided not to construct) the 50 kw facility at his or his transferee's cost. Petitioner has also attempted to pretend that the 50 kw facility is separate from the AM station or its Agreement with Respondent, as if it had an independent existence. That is not so. The 50 kw facility is simply a later manifestation of the rights Petitioner had—and agreed to sell Respondent—in 1968. It is true that in 1968 Petitioner could have sold Respondent the AM station without the construction permit, and that in 1973 it would be difficult if not impossible to sell that station without the 50 kw facility which is now

part of its license. But that is a result of Petitioner's breach of its Agreement with Respondent and its post-breach (and post-litigation) activity. The Pennsylvania Supreme Court appropriately applied the Agreement to these changed circumstances.

Furthermore, there is no factual basis for Respondent's contention that it was never heard by the Pennsylvania courts on the 50 kw facility. Even at the 1970 trial, Respondent adduced testimony indicating that it was in the process of constructing the towers and buildings for a 50 kw facility, and it argued that these expenditures made specific performance inequitable. Since Petitioner made no showing that it had used its best (or any) efforts to keep the construction permit in effect, and since the AM license at that time was for a 1 kw facility, the lower court simply ignored that construction. However, at the time the appeal was argued, Petitioner had obtained the modification of the AM license from 1 kw to 50 kw. Again, it was Petitioner which raised these facts fully before the Pennsylvania Supreme Court, arguing that specific performance was now impossible. That Supreme Court accepted Petitioner's argument, but since Respondent had been entitled to the 50 kw facility under the agreement, it modified the Decree to provide for the transfer of the stations and the 50 kw facility, but required Respondent to pay the costs of that construction. Further, it remanded for a full hearing on such costs.

It is nonsense for Petitioner to say that it was denied the opportunity to be heard or due process of law regarding facts which it itself placed before the court as the basis for its arguments. Petitioner's real complaint is that the Pennsylvania Supreme Court took cognizance of the facts Petitioner placed before it, but then applied a remedy it deemed equitable instead of the inequitable result for which Petitioner contended.

Similarly, there is no merit whatsoever to Petitioner's complaint that the Supreme Court ordered that it be reimbursed only its costs of construction. Again, it must be emphasized that Petitioner breached an Agreement under which it was required to sell to Respondent the elements of a 50 kw facility in embryonic form, so that the value of such a facility was encompassed by the purchase price specified in the Agreement of Sale.

The 50 kw facility consists of three elements: the license, the site and the tangible improvements. Since the purchase price specified in the Agreement included the value of the right to obtain the 50 kw license (embodied in the construction permit) and the value of the right to obtain the 50 kw site (at the price embodied in the option), any appreciation in these items was clearly to be for Respondent's benefit. Therefore, the only items for which Petitioner can properly claim reimbursement are the costs actually expended to buy the site pursuant to exercise of the option and the costs of the tangible improvements at the site (the transmitter building, towers and associated electronic equipment).

As the Pennsylvania Supreme Court noted in its Opinion [Petition for Certiorari, Appendix A, p. 17a, n. 10]:

> Whether a seller should be allowed to be reimbursed for improvements made by him to the property depends upon the equity of the particular situation.

In applying this generally accepted principle, court decrees have varied from refusing to allow any reimbursement, *Coppom v. Humphreys*, 171 Colo. 410, 467 P. 2d 816 (1970), to allowing the increase in value, *Fitzpatrick v. Allied Contracting Company*, 24 Ill. 2d 448, 182 N. E. 2d 183 (1962), depending on the circumstances. However, the majority of cases have conditioned specific performance on reimbursement of the actual cost of an improvement. *See, e.g., Nelson*

*v. Robinson,* 189 Iowa 1076, 178 N. W. 416 (1920); *Fontaine v. Brown County Motors Co.,* 251 Wis. 433, 29 N. W. 2d 744 (1947) (increased value but not to exceed actual cost); Annot., 7 A. L. R. 2d 1205 § 18. In Pennsylvania, the decision of *Phillips v. Coast,* 130 Pa. 572 (1890), in a similar situation, points to the same result. In *Phillips,* defendants had drilled oil wells mistakenly believing they were lessees. It was held that defendants were entitled to a set-off for the actual cost of drilling the wells.

Thus, the Supreme Court's modification of the specific performance Decree provides Petitioner with all the reimbursement to which it is entitled. Petitioner complains that the Supreme Court described its action in constructing the 50 kw facility as "unilateral" and "questionable." The actions were clearly unilateral. Furthermore, Petitioner's failure to make any showing either in the lower court or on appeal that it had used its best (or any) effort to obtain an extension of the construction permit justifies characterization of its actions as "questionable". Nevertheless, it is clear that the Supreme Court accepted Petitioner's contention that it had not acted culpably, for if the Court had found willfulness, it would have been justified in providing no reimbursement to Petitioner. Thus, in *Schiavone v. Ashton,* 269 Ill. App. 386 (1933), while a cross-claim for specific performance was pending, the owner built a brick building on the property. Despite the fact that earlier lower court decisions had found for the owner, the appellate court in approving specific performance found that the owner had unlawfully repudiated the contract of sale and was, therefore, not entitled to any reimbursement for the cost of constructing the building. In fact, the Pennsylvania Supreme Court's modification of the instant Decree requires Respondent not to challenge the costs incurred by Petitioner. Thus, in practical effect, Respondent has been deprived of the opportunity to construct

the 50 kw facility at his own cost which he would have had but for the improper refusal of Petitioner to perform its Agreement of Sale. The Petitioner can hardly be heard to complain because the Pennsylvania Supreme Court has attempted to treat both parties fairly and equitably.

## II. There Is No Conflict Between the State Court's Specific Performance Decree and the Federal Communications Act.

Petitioner has attempted to fabricate a "conflict" between the Decree of Specific Performance and the Federal Communications Act. This argument is without merit, for there is no connection whatsoever between the two in fact or in law. The state court decision enforces the Pennsylvania law of contracts. The transfer contemplated in that contract is subject to FCC approval, and when application is made to it, the FCC will effect the policy of the Communications Act.

Furthermore, Petitioner's contention that the Pennsylvania Supreme Court's modification requiring it to transfer the 50 kw facility on reimbursement of its costs of construction is a "penalty" defies reality. As indicated above, but for Petitioner's violation of its Agreement of Sale, it would not have been in the position to incur construction costs, and since the original sale price encompassed the value of the prospective 50 kw facility, all it could equitably obtain was reimbursement of costs. Thus, reimbursement is not a penalty but Petitioner's maximum equitable adjustment. Nor can Petitioner fully contend that it was obliged to construct the facility, for it concedes that the permit could have lapsed (Petition for Certiorari, p. 22) and had that happened, Petitioner's sales agreement with Respondent would still have been effective.

Finally, even if the Specific Performance Decree could be considered a penalty, this Court held in *Regents of*

*Georgia v. Carroll*, 338 U. S. 586, 70 S. Ct. 370, 94 L. ed. 363 (1950) that such a state court judgment was not inconsistent with the Communications Act of 1934. In *Carroll*, the FCC, before renewing a radio license, required the Regents to repudiate an agreement under which the Regents had purchased stock of a company which had formerly operated the radio station for the Regents. The FCC deemed the stock purchase agreement the continuation in an altered form of an arrangement it had theretofore held to violate the Communications Act. The other party to the stock purchase agreement sued in a Georgia court on the stock purchase agreement, and was awarded damages. This Court noted that the damage action constituted no direct challenge to the ruling of the FCC regarding the legality of the prior arrangement. It deemed the issue to be whether the Communications Act and the Constitution prevented a state from entering a judgment giving recovery on "the very stock purchase contract that justified the Commission's refusal of a license." 338 U. S. at p. 596. Against the argument that the state court judgment thwarted the FCC's enforcement of the requirements of the Act, this Court affirmed the Georgia judgment, holding that the FCC's order could not affect the validity of a contract. If the state court judgment in *Carroll* did not conflict with the Communications Act, *a fortiori*, the Pennsylvania Supreme Court's Decree of Specific Performance could not be deemed to do so.

## CONCLUSION.

The Pennsylvania Supreme Court properly found that Petitioner had violated its Agreement with Respondent and properly modified the lower court's Decree of Specific Performance to do equity to both parties considering the change in circumstances during litigation. Petitioner itself raised and based arguments before the Pennsylvania Supreme Court on these changes in circumstances. It cannot now claim it was not heard when in fact it was, and its real complaint is that it argued for one result based on the changed circumstances and the Pennsylvania Supreme Court reached a different and more equitable result taking those circumstances into account. All of these matters are considerations of state law and raise no questions of concern to this Court. Finally, there is no conflict whatsoever between the Decree of Specific Performance and the Communications Act of 1934.

For the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT G. KEENE, JR.,
*Attorney for Respondent.*

August 14, 1968

Blackburn & Co., Inc.
1725 K St. N.W.
Washington, D. C. 22036

Gentlemen:

Subject to agreement on a formal contract containing the provisions hereinafter set forth, and subject to FCC approval, we hereby offer to purchase the assets of Radio Stations WEEP and WEEP-FM, Pittsburgh, Pa., on the following terms and conditions:

1. We will pay a total purchase price of $650,000, as follows:

(a) We will pay $175,000 cash at closing. Of this amount, ~~$50,000~~ $25,000 will be placed in escrow at the time of signing a formal contract, with the balance of ~~$125,000~~ $150,000 to be paid at closing. In the event of Buyer's default, liquidated damages shall be $25,000.

(b) The balance of the purchase price of $475,000 will be paid as follows:

No payments of principal or interest during the first six months.

Four quarterly principal payments of $12,000 each commencing ~~six~~ nine months after closing.

Four quarterly principal payments of $18,000 each commencing ~~18~~ 21 months after closing.

Twelve quarterly principal payments of $29,583.33 each commencing ~~30~~ 33 months after closing.

Said installment obligation of $475,000 will be evidenced by a note of Buyer to Seller setting forth the above schedule of payments and providing for payment of interest at the rate of 6% per annum computed on the unpaid balance from time to time remaining, with interest to be paid on said unpaid balance concurrently with each payment of principal.

Said note will be secured by a mortgage on all of the assets delivered. If a new corporation is formed for the purpose of completing this purchase, all of the stock in said new corporation shall be pledged as additional security for said note. If an existing corporation becomes the Buyer and if its stock cannot be so pledged, Seller shall have the right to examine such buying corporation's balance sheet prior to execution of a formal contract and, if such balance sheet is not satisfactory to him, shall then have the right to void this entire transaction.

APPENDIX A

A1

Buyer reserves the right to prepay said installment note, in whole or in part, at any time without penalty.

2. It is understood and agreed that all of the assets of said radio stations, except for the land at the present transmitter site and cash and accounts receivable, are to be delivered free and clear of any and all liens and encumbrances. An inventory of the assets to be delivered will be prepared and will become a part of the formal contract.

3. Seller agrees to lease the present transmitter site to Buyer at a rental of $100 per month for a period of 10 years after closing with an option to Buyer to renew for another 10-year period at a rental of $250 per month. Said rentals shall be net to the Lessor; that is, Lessee shall pay all taxes, insurance and upkeep costs on said property. Seller shall also grant Buyer the right of first refusal on any sale of said property. Buyer shall have the right to cancel such lease at any time on 90 days' notice.

4. Seller will be responsible for accounts payable and will also retain accounts receivable, except that Buyer will collect said accounts receivable for a period of 90 days after closing, after which Buyer will turn over to Seller all monies collected and all uncollected accounts.

5. In addition to the assets previously referred to, Seller will also deliver to Buyer all his right, title and interest in an FCC Construction Permit for increasing the power of Radio Station WEEP to 50,000 watts, as such may appear at the time of closing. Between now and the time of closing, Seller agrees to use his best efforts to keep such 50 kw C.P. in full force and effect and in good standing. If, however, at the time of final closing Seller is unable for any reason to deliver to Buyer such 50 kw C.P., there shall then be a reduction in the total purchase price of $25,000, this being the approximate amount of Seller's present investment in said C.P. Such reduction shall be reflected in the cash downpayment which, under such conditions, would be reduced to $150,000.

6. In the event that such 50 kw. C. P. is delivered to Buyer at closing, Buyer then agrees to purchase from Seller the 50 kw. transmitter now owned by Seller for the sum of $25,000, ~~cash.~~ on terms of $10,000 cash down and three annual payments of $5,000 each plus 6% interest. If such 50 kw C.P. is not delivered to Buyer, Buyer shall have no obligation to purchase said transmitter.

7. Seller will also deliver to Buyer the option to lease and/or purchase the new transmitter site for the 50 kw. installation for $45,000.

In any event, Buyer's obligation to purchase shall be conditioned on prior inspection and approval of transmitter by Buyer's engineer.

APPENDIX A

8. Buyer agrees to assume all of the contractual obligations of said stations which are usual and normal to its operation, such as a studio-office lease, music licensing agreements, news service contracts, and the like, provided however that all such agreements to be assumed are first made available to Buyer for inspection and approval. A list of all such contracts to be assumed will be prepared and will become a part of the formal contract.

9. Both parties recognize Blackburn & Co., Inc. as exclusive broker in this transaction. Seller will pay the brokerage commission due to Blackburn & Co., Inc. in connection with this transaction and will hold Buyer harmless from any obligation for such commission to Blackburn & Co., Inc.

As evidence of our good faith, we attach herewith our check in the amount of $10,000 made payable to Blackburn & Co., Inc. If this offer is accepted and a formal contract is agreed to, this amount will become a part of the escrow payment mentioned above. If this offer is not accepted or if a formal contract is not agreed to, this check will be returned to us without any obligation.

It is understood that the undersigned is making this offer on behalf of a corporation, either in existence or to be formed, in which he is or will be a stockholder, and that the undersigned has the right to assign all of his rights and obligations under this offer to such corporation.

If this offer is accepted, both parties agree to immediately proceed with the preparation of a formal contract containing the terms and provisions of this letter as well as with the preparation and execution of all necessary applications for filing with the FCC for effecting this proposed transfer.

It is further understood and agreed that for purposes of contract allocation, the total purchase price of $650,000 will be divided approximately as follows:

| | |
|---|---|
| WEEP AM | $400,000 |
| WEEP FM | 225,000 |
| 50 kw C.P. | 25,000. |

Joseph M. Field

Accepted:

GOLDEN TRIANGLE BROADCASTING INC.

By _____
President

Received check for $10,000:

Blackburn & Co., Inc.

_____

## APPENDIX B.

### Excerpt From Petitioner's Brief on Appeal.

Thus, as specifically found by the Commission, once the construction permit was issued, defendant was *obligated* to proceed with the diligent construction of the new 50 kilowatt facility. Accordingly, by reason of its compliance with FCC requirements and directives, it was blatantly unfair and improper for defendant to have been precluded in the instant proceeding from proving the consequences of such action and the changed circumstances that exist as a result.

As also noted in the FCC's opinion and order, with the operation of the new 50 kilowatt facility, the former 1 kilowatt facility is utilized only as an auxiliary transmittter. In other words, the 50 kilowatt facility is now the primary broadcast facility and the 1 kilowatt facility is used only in a secondary capacity in the periods of not more than ½ hour before sunrise in Pittsburgh according to the season or temporarily in the event of a breakdown of the 50 kilowatt transmitter.

Under these circumstances, the lower court's decree of specific performance places the parties in an impossible situation that manifestly was not contemplated when the August 14, 1968 letter was signed. An affirmance of that decree would result in a division of the two facilities and the licenses to operate them, which would leave defendant without an auxiliary transmitter and would give plaintiff an auxiliary transmitter for 50 kilowatt facility which he would not own. Moreover, under FCC rules, the two facilities could not be operated independently since two transmitters cannot broadcast on the same frequency in the same area.

As previously mentioned, defendant acted properly in constructing the 50 kilowatt facility and in accordance with

FCC directives. Neither the defendant's ownership of that facility or its right to operate it are in dispute. Thus, the issue is limited to a proper determination of the rights with respect to the 1 kilowatt facility.

Under these circumstances, and for all of the reasons discussed above, we respectfully submit that the remedy of specific performance is wholly improper and inappropriate in this case. Not only is the alleged contract not sufficiently clear and complete as to be capable of being specifically enforced, but the use of such a remedy, by reason of the changed conditions that now exist, would place the parties in an impossible position. Accordingly, we respectfully submit that if plaintiff is entitled to any remedy at all, which defendant strenuously denies, such remedy should be limited to a remedy at law for damages.

**Conclusion.**

The decree granting specific performance should be reversed. A decree should be entered in favor of defendant. Alternatively, the action should be remanded for hearing on the issue of damages for breach of contract.

Respectfully submitted,

JOHN A. METZ, JR.,
METZ, COOK, HANNA & KELLY,
*Attorneys for Appellant.*

## APPENDIX C.

Mr. Chief Justice Benjamin R. Jones
Supreme Court of Pennsylvania
4th Floor, City Hall
Philadelphia, Pennsylvania

September 29, 1972

Re: Field v. Golden Triangle Broadcasting, Inc.
Case No. 100, March Term 1972

Dear Mr. Chief Justice Jones:

At the September 28, 1972 argument in the above appeal, time restrictions prevented me from citing to the Court several cases in which equity courts had modified or conditioned decrees to recognize changed circumstances and avoid hardship. By this letter, I would like to place those authorities before the Court.

I did cite *Fitzpatrick v. Allied Contracting Company*, 24 Ill. 2d 448, 182 N. E. 2d 183 (1962), where specific performance was conditioned on payment for land improvements made between an option's grant and its exercise.

In addition, in *Nelson v. Robinson*, 189 Iowa 1076, 178 N. W. 416 (1920), plaintiff leased with option to buy at a specified price. Thereafter, paving assessments were imposed on the landowner. The Court conditioned specific performance of the option on the purchaser's acceptance of the land subject to assessments. In a factually identical situation, in *King v. Raab*, 123 Iowa 632, 99 N. W. 306 (1904), the Court affirmed the lower court's decree which conditioned specific performance on plaintiff's reimbursing

defendant for the amount paid for assessments and assuming the unpaid assessments.

Yours sincerely,

S. Gordon Elkins, Attorney for Appellee, Joseph M. Field

cc: Hon. Michael J. Eagen
Hon. Henry X. O'Brien
Hon. Samuel J. Roberts
Hon. Thomas W. Pomeroy, Jr.
Hon. Robert N. C. Nix, Jr.
Hon. Louis L. Manderino

John A. Metz, Jr., Esquire

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-791

GOLDEN TRIANGLE BROADCASTING, INC.,
Petitioner

v.

JOSEPH M. FIELD,
Respondent

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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## INDEX

PAGE

Reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania .. 1

Appendix I ..... 1a

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-791

GOLDEN TRIANGLE BROADCASTING, INC.,
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JOSEPH M. FIELD,
Respondent

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Respondent has first raised, in its Brief in Opposition to the instant Petition for a Writ of Certiorari, the argument that the Supreme Court of Pennsylvania was justified in ordering transfer of Petitioner's 50,000 watt facility to Respondent because of "intervening" or "changed" circumstances related to the said 50,000 watt facility. Respondent bases this argument on a contention that these "intervening" or "changed" circumstances were litigated below. Petitioner believes that Respondent's new argument completely distorts the facts and the record below and accordingly files this Reply to Respondent's Brief.

As pointed out in the Petition for a Writ of Certiorari, both parties and the trial court agreed during trial, and the parties agreed on appeal, that the ownership of the 50,000 watt facility, and any rights with respect thereto, were not in issue in this case (Petition, pages 5-7). Significantly, Respondent's Brief does not deny these facts.

Rather, Respondent's Brief argues that Petitioner did have a hearing with reference to the 50,000 watt facility. This argument is based on complete distortions of the facts relating to (1) the exclusion of evidence at trial, upon objection by Respondent, concerning the 50,000 watt facility, which had been offered by Petitioner to show that specific performance of the contract relating to the 1,000 watt facility would be inequitable, and, (2) Petitioner's argument on appeal that the exclusion of such evidence constituted error.

For example, at page 2 of its Brief, Respondent states that Petitioner (1) offered testimony regarding its construction of the 50,000 watt facility and (2) argued that that construction made specific performance of the contract regarding the 1,000 watt facility inequitable. To that extent Respondent is correct, but Respondent fails to point out that the trial court sustained Respondent's objection that such testimony was "totally irrelevant" and no such testimony or evidence was admitted or considered, therefore, by the trial court to any extent. (R. 337a-349a)[1].

Similarly, at page 7 of its Brief, Respondent again states that Petitioner "adduced" testimony regarding

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1. "R" refers to the printed Record filed in the Supreme Court of Pennsylvania.

the construction of the 50,000 watt facility at trial with regard to its equitable effect, and then states that the trial court "simply ignored that construction". Respondent obviously intends to imply that the trial court ignored the construction of the 50,000 watt facility after a hearing, since the first sentence of that same paragraph reads: "Furthermore, there is no factual basis for Respondent's [sic][2] contention that it was never heard by the Pennsylvania courts on the 50KW facility." Again, the trial court did not "ignore" evidence which that court received *but, rather, expressly excluded that evidence from introduction or consideration upon Respondent's objection that the 50,000 watt facility was not involved in the proceeding.* (R. 337a-349a).

Respondent further attempts to argue that a hearing with reference to the 50,000 watt facility was had before the Supreme Court of Pennsylvania on appeal, expressly stating that Petitioner raised the "issue" or "facts" regarding the 50,000 watt facility (Respondent's Brief, pages 3, 5 and 7) before that court. As its sole support for this argument, Respondent refers to pages 64 and 65 of Petitioner's Appeal Brief (Respondent's Brief, App. B.).

On that basis, Respondent would have this Honorable Court believe that Petitioner had a hearing on the issues with reference to the 50,000 watt facility. In fact, Petitioner's argument to the Supreme Court of Pennsylvania was that *the exclusion of evidence* regarding the 50,000 watt facility by the trial court *was in error* because it would have been, and was, relevant to the

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2. Obviously should read "Petitioner's".

question of the appropriateness of the remedy of specific performance of the contract relating to the 1,000 watt facility (see pages 61 through 65 of the Petitioner's Brief on Appeal, Appendix "I" hereto). The making of such an argument on appeal obviously neither places the rights of the parties with reference to the 50,000 watt facility at issue nor constitutes a hearing on those rights. *Rather, the facts are that the parties agreed, both at trial and on appeal, and the trial court so held, that the rights of the parties with reference to the 50,000 watt facility were not in issue in this case.*

The remainder of Respondent's Brief argues that the decision of the Supreme Court of Pennsylvania with regard to the 50,000 watt facility was proper and makes reference to numerous alleged facts regarding the 50,000 watt facility and its construction. Respondent, however, nowhere makes reference to any evidence or portions of the record below where those facts (or "intervening" or "changed" circumstances as Respondent describes them) were introduced into evidence or were litigated, other than by the misleading implications discussed above. The reason for this omission is obvious — Petitioner has never had a hearing on the question of its rights with reference to the 50,000 watt facility, or the

price, or the circumstances surrounding the construction of the 50,000 watt facility, and, therefore, has been deprived of its property without due process of law.

Respectfully Submitted,

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## APPENDIX I

### Excerpt from Petitioner's Brief on Appeal to the Supreme Court of Pennsylvania

A further reason why the remedy of specific performance is wholly inappropriate in this case is that the granting of such remedy places the parties in an impossible position that clearly was not contemplated when the August 14, 1968 letter was signed.

The letter of August 14, 1968 specifically referred to the transfer of Seller's FCC construction Permit to increase the power of WEEP Radio Station to 50,000 watts and the option to purchase or lease a new 50 kilowatt transmitter site. Subsequently, during the pendency of this litigation, defendant obtained extension of the construction permit and proceeded to construct the facility itself (337a-338a). During the trial, defendant offered to prove the substantial expense it had incurred in such construction, which offer was rejected by the Trial Judge (Offer Exhibit "1"; 397a-399a; 338a-349a). Thereafter, upon the plaintiff's stipulation that the new facility was not covered by the August 14, 1968 letter and that he did not want that facility, the lower court specifically excluded the new 50 kilowatt facility from its decree but nevertheless granted specific performance with respect to the previously existing 1 kilowatt facility

We submit that the ruling of the Trial Judge which excluded defendant's offer of proof with respect to the 50 kilowatt facility as well as the subsequent grant of specific performance as to the 1 kilowatt facility constituted patent error. It is abundantly clear that specific performance cannot be granted as to the 50 kilowatt facility not in existence on August 14, 1968. Everyone

concerned, including the plaintiff and the Trial Judge, were in complete agreement on this point. However, for the lower court nevertheless to grant specific performance as to the 1 kiolwatt facility, without accepting evidence as to the status of the 50 kilowatt facility and the changed conditions that exist because of its construction, constituted a refusal by the Court to consider the effect of its decree and was highly improper.

In so proceeding, the lower court based its ruling on the ground that defendant could not defeat the plaintiff's claim for specific performance by having voluntarily engaged in subsequent conduct which rendered the alleged contract incapable of performance. However, the construction of the 50 kilowatt facility by defendant was not in any way improper or devious but rather was done in the ordinary course of business and, and directives. This was made abundantly clear by the more importantly, in accordance with FCC regulations Commission itself in a Memorandum Opinion and Order adopted October 21, 1970, released October 28, 1970, in a proceeding captioned *"In re* Application of Golden Triangle Broadcasting, Inc., Radio Station WEEP, Pittsburgh, Pennsylvania, for license to cover construction permit for changed facilities and request for program test authority", docketed at File No. BL-12753.* In that opinion and order, the Commission approved defendant's request to conduct program test authority for its new 50 kilowatt facility preliminary to the final issuance of a license to operate the facility.

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*This Memorandum Opinion and Order, which is a matter of public record, is reproduced at the end of this brief for the convenience of the Court as an Appendix.

*Appendix I.*

As noted by the Commission in its opinion, plaintiff opposed the issuance of such authority to defendant on the ground that this litigation was pending and the commencement of operation of the 50 kilowatt facility may mean that the former facility, *i.e.,* the 1 kilowatt facility, may no longer exist "either legally or physically". The Commission rejected the plainttiff's position as being "without merit" and, in doing so, made the following highly significant statements (at pp. 2-3):

> "In issuing a construction permit to Golden Triangle to increase the operating power of WEEP to 50 kw, a finding was made that the construction of appropriate facilities thereunder and operation of the station with such facilities would serve the public interest, convenience and necessity. *Once the permit was issued, Golden Triangle was under an obligation to construct these facilities in a diligent manner,* and upon completing construction, was entitled to request, pursuant to section 73.96(a) of the rules, authority to commence program tests with its new operation."

Thus, as specifically found by the Commission, once the construction permit was issued, defendant was *obligated* to proceed with the diligent construction of the new 50 kilowatt facility. Accordingly, by reason of its compliance with FCC requirements and directives, it was blatantly unfair and improper for defendant to have been precluded in the instant proceeding from proving the consequences of such action and the changed circumstances that exist as a result.

As also noted in the FCC's opinion and order, with the operation of the new 50 kilowatt facility, the former

1 kilowatt facility is utilized only as an auxiliary transmitter. In other words, the 50 kilowatt facility is now the primary broadcast facility and the 1 kilowatt facility is used only in a secondary capacity in the periods of not more than ½ hour before sunrise in Pittsburgh according to the season or temporarily in the event of a breakdown of the 50 kilowatt transmitter.

Under these circumstances, the lower court's decree of specific performance places the parties in an impossible situation that manifestly was not contemplated when the August 14, 1968 letter was signed. An affirmance of that decree would result in a division of the two facilities and the licenses to operate them, which would leave defendant without an auxiliary transmitter and would give plaintiff an auxiliary transmitter for 50 kilowatt facility which he would not own. Moreover, under FCC rules, the two facilities could not be operated independently since two transmitters cannot broadcast on the same frequency in the same area.

As previously mentioned, defendant acted properly in constructing the 50 kilowatt facility and in accordance with FCC directives. Neither the defendant's ownership of that facility or its right to operate it are in dispute. Thus, the issue is limited to a proper determination of the rights with respect to the 1 kilowatt facility.

Under these circumstances, and for all of the reasons discussed above, we respectfully submit that the remedy of specific performance is wholly improper and inappropriate in this case. Not only is the alleged contract not sufficiently clear and complete as to be capable of being specifically enforced, but the use of such a

remedy, by reason of the changed conditions that now exist, would place the parties in an impossible position. Accordingly, we respectfully submit that if plaintiff is entitled to any remedy at all, which defendant strenuously denies, such remedy should be limited to a remedy at law for damages.

**Conclusion.**

The decree granting specific performance should be reversed. A decree should be entered in favor of defendant. Alternatively, the action should be remanded for hearing on the issue of damages for breach of contract.

Respectfully submitted,

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